Supreme Court, U.S.
FILED
SEP 6 1995
CLERK

No. 95-44

In The

Supreme Court of the United States

October Term, 1995

RICHARD C. BECHERER, et al.,

Cross-Petitioners,

v.

J. DON ADAMS, MERRILL LYNCH, PIERCE, FENNER & SMITH, INCORPORATED, et al.,

Cross-Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO CROSS-PETITION FOR WRIT OF CERTIORARI

BUTZEL LONG, P.C.

By: DOUGLAS G. GRAHAM
DENNIS K. EGAN*
SHELDON H. KLEIN
BARBARA L. MCQUADE
150 West Jefferson
Suite 900
Detroit, Michigan
48226-4430
(313) 225-7000

BAKER, DONELSON, BEARMAN & CALDWELL

By: DAVID C. ANDREW
801 Pennsylvania Ave., N.W.
Suite 800
Washington, D.C.
20004
(202) 508-3417

Attorneys for Cross-Respondents Merrill Lynch, Pierce, Fenner & Smith, Inc., Francis Lavin and Martin Cicco

September 6, 1995

* Counsel of Record

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I.

Whether the Petition should be denied because the Court of Appeals did not make the ruling on which Petitioners seek review.

II.

Whether the Petition should be denied because Petitioners do not seek review of the Court of Appeals' holding that Petitioners failed to produce evidence of fraud by Merrill Lynch, which is an independent ground for affirmance.

III.

Whether the Petition should be denied because the Court of Appeals' holding that Petitioners failed to produce evidence of fraud by Merrill Lynch is not appropriate for review by this Court.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv

COUNTER-STATEMENT OF THE CASE 1

1. INTRODUCTION 1

2. PROCEDURAL BACKGROUND AT THE DISTRICT COURT 2

A. The FF&E Fraud Claim 2

B. Petitioners' Factual Submission 2

C. Merrill Lynch's Initial Motion for Summary Judgment 3

D. The November 19, 1990 Opinion 4

E. The District Court's Recognition That Breach of Contract Is The Core Of The FF&E Fraud Claim 4

F. The District Court's Ruling That Petitioners Had No Contract Claims Against Merrill Lynch 4

G. The SSG Contract Claims 5

H. Renewal Of Merrill Lynch's Summary Judgment Motion 5

I. The August 7, 1992 Opinion 5

3. THE COURT OF APPEALS' OPINION 6

TABLE OF CONTENTS – Continued

Page

REASONS FOR DENYING THE WRIT 8

I. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DID NOT MAKE THE RULING ON WHICH PLAINTIFFS SEEK REVIEW 8

II. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS DO NOT SEEK REVIEW OF THE COURT OF APPEALS' HOLDING THAT PETITIONERS FAILED TO PRODUCE EVIDENCE OF FRAUD BY MERRILL LYNCH, WHICH IS AN INDEPENDENT GROUND FOR AFFIRMANCE..... 9

III. THE COURT OF APPEALS' HOLDING THAT PETITIONERS FAILED TO PRODUCE EVIDENCE OF FRAUD BY MERRILL LYNCH IS NOT APPROPRIATE FOR REVIEW BY THIS COURT..... 10

CONCLUSION 15

TABLE OF AUTHORITIES

Page

CASES

Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 9

Forest Hills Early Learning Center, Inc. v. Lukhard, 728 F.2d 230 (4th Cir. 1984) 13

General Talking Pictures Corp. v. Western Electric Co., 304 U.S. 175 (1938) 10

Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp., ___ U.S. ___, 114 S.Ct. 425 (1993) 9

Miller v. Hedlund, 813 F.2d 1344 (9th Cir. 1987) ...10, 11

Missouri Pacific R. Co. v. Harbison-Fischer Mfg. Co., 26 F.3d 531 (5th Cir. 1994) 11

Tidelands Royalty B. Corp. v. Gulf Oil Corp., 804 F.2d 1344 (5th Cir. 1986) 10

TXO Production v. Alliance Resources Corp., ___ U.S. ___, 133 S.Ct. 2711 (1993) 14

STATUTES

15 U.S.C. § 78j(b) 9

15 U.S.C. § 78bb 6, 8, 13

COURT RULES

Sup. Ct. R. 14.1 9

COUNTER-STATEMENT OF THE CASE

1. INTRODUCTION

Petitioners are disappointed investors in a luxury resort hotel in Naples, Florida who launched broad attacks against all parties involved with the investment, only to come up short when required to offer evidence. The Petition is limited to the claim that Merrill Lynch, the sales agent for the Hotel offering, and Shelter Seagate Corporation ("SSG"), the developer, failed to disclose to Petitioners that SSG would, after the completion of the Hotel offering, breach its contract with Petitioners by leasing certain furniture, fixtures and equipment rather than purchasing it (the "FF&E fraud claim").

Five and one-half years of litigation involving two complaints, extensive discovery and motion practice and a partial trial produced a massive, 28-volume appellate appendix. After reviewing this record, the Court of Appeals, in a unanimous opinion authored by Judge Cornelia Kennedy and joined in by Judges Damon Keith and Richard Suhrheinrich, correctly held that Merrill Lynch was entitled to judgment as a matter of law on the FF&E fraud claim because Petitioners "have not provided any evidence of bad faith, as is necessary to support a fraud claim." 43 F.3d 1054, 1064.

The Petition does not seek review of this ruling. Petitioners only seek review of the *District Court's* ruling that they could not pursue the FF&E fraud claim against Merrill Lynch because Petitioners had obtained a judgment for breach of contract against SSG (the so-called "one recovery" ruling). (Statement of Questions Presented; Petition pp. 2, 11). Petitioners incorrectly attribute

this ruling to the Court of Appeals and also incorrectly represent this to be the "sole basis" for the Court of Appeals' decision. (Petition at 11-12.)

The Petition should be denied because the one recovery ruling was not part of the Court of Appeals' opinion. Further, the Petition does not challenge the Court of Appeals' holding that Petitioners failed to prove an essential element of their fraud claim. The Petition's failure to challenge this independent ground for affirmance is fatal. Finally, the Court of Appeals' holding that Petitioners failed to produce evidence of fraud is not appropriate for review by this Court.

2. PROCEDURAL BACKGROUND AT THE DISTRICT COURT

A. The FF&E Fraud Claim

Petitioners alleged that subsequent to the closing of the hotel offering, SSG breached its contract by leasing FF&E which it was contractually obligated to purchase from the offering proceeds. They claimed Merrill Lynch was liable for fraud because before the offering closed, they alleged, Merrill Lynch knew SSG intended to lease FF&E but intentionally concealed that from Petitioners.

B. Petitioners' Factual Submission

In the summer of 1990, at the direction of the District Court, Petitioners conducted discovery on their fraud claim and then filed a brief and supporting evidence purporting to establish a *prima facie* case of fraud. While

the Petition asserts that discovery was "limited", Petitioners' counsel received thousands of Merrill Lynch documents, deposed every Merrill Lynch witness that they sought, and ultimately assured the District Court that they had the discovery needed to establish their *prima facie* case. (July 24, 1990, Hearing Transcript, pp. 6-7.)

C. Merrill Lynch's Initial Motion for Summary Judgment

Merrill Lynch and SSG responded to Petitioners' factual submission with their own, seeking summary judgment on the FF&E leasing claim. The private placement memorandum for the offering disclosed that certain FF&E would be leased. SSG submitted evidence that at the time of the closing of the offering, it did not intend to lease the kitchen and laundry FF&E.[1] Merrill Lynch filed uncontradicted deposition testimony and documents which established that prior to closing, when SSG proposed leasing additional FF&E for the kitchen and laundry areas, Merrill Lynch reduced and restructured its fees to eliminate that need. As a result, when the offering closed, Merrill Lynch understood that this FF&E would *not* be leased.

---

[1] In addition, SSG proffered evidence that when it later leased the FF&E, it did so in good faith based upon the documents and two legal opinions.

D. The November 19, 1990 Opinion

On November 19, 1990, the District Court issued an opinion on the pending motions. With respect to the FF&E fraud claim, the Court ruled:

> Because there *may* be genuine issues of material fact on plaintiffs' second and third fraud claims [including the FF&E fraud claim], defendants' motion for summary judgment on those claims is DENIED *without prejudice*.

799 F. Supp. 755, 783 (emphasis added).

E. The District Court's Recognition That Breach of Contract Is The Core Of The FF&E Fraud Claim

At the next conference, the District Court recognized that alleged breaches of contract by SSG were the core of the fraud claims. Petitioners agreed that breach of contract was "basically the essence of the case" (December 7, 1990 Hearing Transcript, p. 4). The court therefore deferred consideration of the remaining fraud claims pending an expedited, bifurcated trial on the contract claims against SSG.

F. The District Court's Ruling That Petitioners Had No Contract Claims Against Merrill Lynch

Petitioners then filed an Amended Complaint asserting contract claims against Merrill Lynch on theories of "joint venture" and "breach of the duty of good faith". After Merrill Lynch moved to dismiss, the District Court

held that Petitioners had no contract claims against Merrill Lynch and scheduled the contract claims against SSG for trial. (March 12, 1991 Hearing Transcript, p. 5; March 15, 1991 Order).

G. The SSG Contract Claims

The day before trial, the District Court held that SSG breached its contract with investors by leasing FF&E and granted summary judgment against SSG on liability. After a bench trial on damages, it awarded Petitioners $6.7 million in damages, which represented all of the lease payments and lost tax credits, plus interest. 799 F. Supp. at 777.

H. Renewal Of Merrill Lynch's Summary Judgment Motion

Merrill Lynch renewed its motion for summary judgment on the FF&E fraud claim. As a result of the bench trial, the District Court had an extensive factual record – the original 1990 fact submissions, summary judgment motions and documents, the trial testimony and exhibits, and additional materials filed with the renewed summary judgment motions.

I. The August 7, 1992 Opinion

The District Court's August 7, 1992 opinion dismissed all remaining claims against Merrill Lynch. On the FF&E fraud claims, the District Court held that because Petitioners had been awarded damages for SSG's breach,

they could not recover additional damages for the same injury.

3. THE COURT OF APPEALS' OPINION

The Petition incorrectly asserts that the Court of Appeals affirmed the District Court "solely on the ground that" Petitioners had been granted a $6.7 million judgment against SSG for breach of contract. (Petition, pp. 11-12). When the Court of Appeals intended to adopt the District Court's reasoning, it did so expressly (and with page citations).[2] The Court never stated that it was adopting the District Court's one recovery ruling on the FF&E fraud claim, nor did it refer to the statute (Section 28(a) of the Exchange Act of 1934, 15 U.S.C. § 78bb(a)) or the case law on which the District Court relied.

Instead, the Court of Appeals specifically responded to two of Petitioners' arguments. One argument was that "the District Court erred in dismissing their FF & E fraud claims because the dismissal prevented them from pursuing judgments against all potential joint and severally liable parties." 45 F.3d at 1063. The court responded: "[P]laintiffs have not provided any evidence of bad faith, as is necessary to support a fraud claim." *Id.* at 1064. The court expanded on the point in rejecting Petitioners'

---

[2] For example, in affirming the dismissal of the "Ritz-Carlton" fraud claim, Judge Kennedy wrote: "we affirm the District Court on that issue for the reasons stated in its opinion. *Becherer*, 799 F. Supp. at 781-84." *Id.* at 1065. Similarly, in affirming the dismissal of the claims against the lender, Judge Kennedy wrote: "we affirm the District Court for the reasons stated in its opinion. *Becherer*, 799 F. Supp. at 772-75." *Id.* at 1068.

claim that Merrill Lynch breached its duties as an interim escrow agent by not disclosing SSG's intention to lease:

> [W]e have reviewed the District Court's opinions in this case and find no discussion of when Merrill Lynch learned of SSG's intention to lease the disputed FF & E and whether Merrill Lynch thought that intention contravened the contract. Nor have the Becherer plaintiffs [Petitioners] pointed to any part of the record to show they raised this argument below. We will not address it for the first time on appeal. *Merrill Lynch points to evidence that it reduced its commission [from SSG] so that the project could be completed as promised and that it believed that, with these concessions, SSG could fulfill its end of the contract.*
>
> We earlier addressed the Becherer plaintiffs' allegations regarding Merrill Lynch's projections and SSG's decision to lease FF & E. We will not repeat that discussion here, *except to say the claim has no merit.*

Id. at 1066 (emphasis added).

Petitioners' second argument was that Petitioners' tort damages would have been different than their contract damages and, therefore, they should be able to recover on both claims. The Court of Appeals disagreed, finding that under these circumstances, the District Court's measure of contract damages – the full amount of the lease payments, plus interest – "make plaintiffs whole. Plaintiffs, therefore, are not entitled *to recover* under any tort theory, as that would result in a windfall to plaintiffs." *Id.* at 1064 (emphasis added). The Court of Appeals held that Petitioners could not *recover* in *both* tort and contract where the measure of damages is the same,

not that Petitioners could not seek judgments under both theories.

REASONS FOR DENYING THE WRIT

I. THE PETITION SHOULD BE DENIED BECAUSE THE COURT OF APPEALS DID NOT MAKE THE RULING ON WHICH PLAINTIFFS SEEK REVIEW.

The "Questions Presented" in the Petition relate solely to the Court of Appeals' alleged interpretation of Section 28(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78bb, which addresses recoveries under the Exchange Act and provides that a plaintiff may not recover more than actual damages. Question 1 claims that the Court of Appeals misinterpreted the statute. Question 2 claims that the Court of Appeals' misinterpretation denied Petitioners due process. The body of the Petition confirms its limited scope. (Petition, pp. 2, 11).

The Petition mistakenly challenges the earlier ruling of the *District Court*, which cited Section 28(a). The Court of Appeals did not interpret, cite or rely on Section 28(a) because the statute was not part of its decision. Rather, the Court of Appeals relied upon an alternate ground to affirm the District Court – the lack of evidence of fraud. Thus, the Petition is misdirected to a ruling the Court of Appeals never made.

II. THE PETITION SHOULD BE DENIED BECAUSE PETITIONERS DO NOT SEEK REVIEW OF THE COURT OF APPEALS' HOLDING THAT PETITIONERS FAILED TO PRODUCE EVIDENCE OF FRAUD BY MERRILL LYNCH, WHICH IS AN INDEPENDENT GROUND FOR AFFIRMANCE.

The Court of Appeals affirmatively ruled that "[P]laintiffs have not provided any evidence of bad faith, as is necessary to support a fraud claim." *Id.*, at 1064. Petitioners waived any challenge to that holding when they failed to include it in their Questions Presented. Sup. Ct. R. 14.1; *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, ___ U.S. ___, 114 S.Ct. 425 (1993).

Petitioners' failure to include the Court of Appeals' bad faith ruling in their Questions Presented is fatal to their Petition. Petitioners do not dispute that scienter is an essential element of their fraud claims. *See, e.g., Ernst & Ernst v. Hochfelder,* 425 U.S. 185 (1976) (claim under Section 10(b) of Securities Exchange Act of 1934, 15 U.S.C. § 78j(b)). In support of its summary judgment motion, Merrill Lynch offered unrebutted deposition testimony and documents proving that prior to closing, Merrill Lynch reduced and restructured its fees, eliminating, it believed, any need to lease the FF&E. The Court of Appeals, relying on that unrebutted evidence, correctly held that Petitioners failed to offer evidence demonstrating either intentional fraud or recklessness by Merrill Lynch. Thus, whether or not the Court of Appeals adopted the District Court's one recovery ruling, the Court of Appeals' ruling on the lack of fraud is an independent basis for affirmance not challenged by the Petition. The Petition should therefore be denied.

III. THE COURT OF APPEALS' HOLDING THAT PETITIONERS FAILED TO PRODUCE EVIDENCE OF FRAUD BY MERRILL LYNCH IS NOT APPROPRIATE FOR REVIEW BY THIS COURT.

Even had Petitioners challenged the ruling on the lack of evidence of fraud, the Petition should still be denied. The Petition would be nothing more than a challenge to summary judgment in what the Court of Appeals aptly characterized as "complicated commercial litigation". 43 F.3d at 1057. Having held that Petitioners failed to adduce evidence of fraud, the Court of Appeals correctly concluded that Merrill Lynch was not liable for fraud. This Court will not grant certiorari to review evidence or inferences drawn from it. *General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938).

Petitioners cite no case holding that granting summary judgment on fraud claims for failure to adduce evidence of scienter is improper. Thus, the Court of Appeals' decision is consistent with decisions of this Court and other Courts of Appeals.

Nothing in the Court of Appeals' decision represents a departure from the accepted and usual course of judicial proceedings. Contrary to Petitioners' assertion, the Court of Appeals did not, by holding Petitioners could not prove an essential element of their claim, impermissibly "make initial findings of fact." (Petition, p.10, n.3).[3]

---

[3] *Tidelands Royalty B. Corp. v. Gulf Oil Corp.*, 804 F.2d 1344 (5th Cir. 1986) and *Miller v. Hedlund*, 813 F.2d 1344 (9th Cir. 1987), cited by Petitioners, offer them no support. In *Tidelands*, the Court of Appeals remanded the case to allow Tidelands to

Summary judgment does not involve findings of fact. Rather, it involves a legal ruling as to the *absence* of material issues of fact.

It was, moreover, proper for the Court of Appeals to affirm the dismissal of the FF&E fraud claim based on grounds advanced in, but not relied upon by, the District Court:

> Even though summary judgment was granted on [one ground] . . . , we can affirm the district court on the alternate grounds asserted below. . . . *A grant of summary judgment may be affirmed on a legal basis not ruled upon below.* We may affirm even in situations where the district court's ruling was incorrect, as long as the result was proper.

Missouri Pacific R. Co. v. Harbison-Fischer Mfg. Co., 26 F.3d 531, 538 (5th Cir. 1994) (citations and internal quotations omitted). The Court of Appeals relied on a ground properly before it. In the District Court, Merrill Lynch had briefed and argued for summary judgment on the FF&E claim because there was no evidence of scienter. Merrill Lynch renewed its motion after the SSG contract trial and

---

amend its pleadings to assert a new claim. The court understandably declined to determine whether Gulf would be entitled to summary judgment on an unpleaded claim. *Miller* held that the district court erred in granting defendants summary judgment based on immunity and remanded the case for further proceedings on the merits, because resolution of the case depended on unresolved factual issues. Neither case suggests that the Court of Appeals could not grant summary judgment on a ground raised in, but not relied on by, the District Court if the record demonstrated the absence of a material issue of fact.

argued this ground in the Court of Appeals. The Court of Appeals considered a fully developed record.

Petitioners assert that they offered evidence of Merrill Lynch's "uncontroverted knowledge that SSG intended to lease substantial FF&E to finance construction cost overruns . . . " (Petition at 6). However, as the Court of Appeals recognized, Petitioners never rebutted the fact that Merrill Lynch reduced and restructured its fees in order to eliminate the need for leasing. Not only did Merrill Lynch (and SSG) controvert Petitioners' assertion, but Petitioners completely failed to offer evidence that Merrill Lynch knew that SSG would lease the FF&E in the future and that Merrill Lynch intentionally concealed that information from Petitioners.

Moreover, some of the evidence alluded to by Petitioners was not considered by the District Court because they filed it late. The Court of Appeals affirmed the rejection of the untimely materials:

> The affidavits relied upon by the Becherer plaintiffs, both below and on appeal, were not filed with the District Court until the morning of the scheduled hearing on their motions. . . . The Becherer plaintiffs have not provided any

explanation for the tardy filing.[7] Thus, the District Court did not abuse its discretion in refusing to consider the affidavits.

---

[7] We also note that the Becherer plaintiffs did not even allege that the District Court erred in refusing to admit these affidavits until their reply brief. Ordinarily, we will not consider assignments of error raised so late in the appeal process.

Id. at 1065-1066. Thus, the Court of Appeals' ruling on the lack of evidence of fraud should not be reviewed.

Finally, Petitioners attempt to bootstrap the granting of summary judgment into a due process violation. Petitioners incorrectly assert that the dismissal of the FF&E fraud claim under Section 28(a) was a denial of substantive due process because the District Court found that the claim had factual and legal merit when it initially denied Merrill Lynch's motion without prejudice. (Petition at 17). However, the Court of Appeals never discussed Section 28(a), and the District Court never held that the FF&E fraud claim had factual and legal merit. The District Court denied Merrill Lynch's initial summary judgment motion *"without prejudice"* because there "may" be questions of fact. This denial of summary judgment was not a finding that Petitioners had offered sufficient evidence in support of their claims. *Forest Hills Early Learning Center, Inc. v. Lukhard*, 728 F.2d 230, 245 (4th Cir. 1984) ("Even when summary judgment is appropriate on the record so far made in a case, a court may properly decline, for a variety of reasons, to grant it. *See generally*, 10A C. Wright, A. Miller and M. Kane, Fed. Practice & Procedure: Civil § 2728 (1983).")

Petitioners' disagreement with an adverse court ruling does not create a substantive due process issue. "[N]o one would claim (or at least no one has yet claimed) that a substantively correct determination of sufficiency of evidence . . . is a federal constitutional right." *TXO Production v. Alliance Resources Corp.*, ___ U.S. ___, 133 S.Ct. 2711, 2727 (1993) (Scalia, J., concurring). Petitioners claim they had meritorious claims; the Court of Appeals disagreed. Petitioners believe the Court of Appeals erred, as does every other petitioner to this Court. Petitioners cannot transform this case into one worthy of review by repackaging a claimed error of law as a denial of substantive due process.

CONCLUSION

The Petition should be denied because the Court of Appeals did not make the "one judgment" ruling which is the sole basis of the Petition. Instead, the Court of Appeals relied upon an independent ground for affirmance not challenged by Petitioners. The Court of Appeals' ruling on this alternate ground is also not appropriate for review by this Court.

Respectfully Submitted,

BUTZEL LONG
DOUGLAS G. GRAHAM
DENNIS K. EGAN
SHELDON H. KLEIN
BARBARA L. MCQUADE
150 W. Jefferson, Suite 900
Detroit, MI 48226
(313) 225-7000

BAKER, DONELSON, BEARMAN
& CALDWELL
DAVID C. ANDREW
Market Square, Suite 800
801 Pennsylvania, N.W.
Washington, D.C. 20004
(202) 508-3417

Attorneys for Cross-Respondents Merrill Lynch, Pierce, Fenner & Smith, Incorporated, Francis Lavin and Martin Cicco

Dated: September 6, 1995